Filed 7/30/02 Automatic Rain Co. v. McCollum CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

AUTOMATIC RAIN COMPANY, Plaintiff and Respondent, v. A. A. McCOLLUM, Defendant and Appellant.	C037224 (Sup.Ct.No. 97AS04483)

After the contractor on a public works project defaulted, a subcontractor (plaintiff Automatic Rain Company) sued the public entity (the City of Folsom (Folsom), not a party to this appeal) and various other defendants. In relevant part, the complaint alleged that defendant A. A. McCollum was the surety on the project, by virtue of McCollum's status as the alter ego of the entities which were the nominal sureties. The complaint included a count on the bond, and claimed attorney fees pursuant to statute.

Plaintiff settled with Folsom, and assigned its claims in this suit to Folsom. Folsom later voluntarily dismissed those claims. McCollum filed a cost bill which included a claim for attorney fees incurred defending plaintiff's claims, pursuant to a statute providing for fees to the prevailing party in an action on a surety bond. (Civ. Code, § 3250, hereafter section 3250.) Both plaintiff and Folsom moved to tax the fees portion of the cost bill. The motion to tax was granted and McCollum appealed from the tax order and the ensuing judgment for costs.

We shall reverse. The fact McCollum was not proven to be the alter ego of the nominal sureties does not deprive him of entitlement to fees. He was required to defend a suit alleging he *was* the surety and had the suit prevailed he would have been liable for fees incurred by plaintiff (or plaintiff's assignee, Folsom). A plain reading of section 3250, as well as equitable considerations, compels reversal with directions.

PROCEDURAL BACKGROUND

As stated, the complaint by plaintiff in part alleged McCollum was the alter ego of the sureties and sought to recover on the payment bond. Liability against Folsom was partly predicated on Folsom's alleged failure to ensure the use of admitted surety insurers as required. (See *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605.) Folsom cross-complained against the defaulting contractor and the sureties, but did not cross-complain against McCollum. Folsom did oppose a summary judgment motion filed by a surety

and McCollum, claiming McCollum was liable as an alter ego of the surety.

Ultimately, plaintiff, Folsom and other parties, but not McCollum, settled. Pursuant to the settlement, plaintiff filed a voluntary dismissal on January 3, 2000.

McCollum filed a memorandum of costs, including attorney fees, on or about January 13, 2000.

On February 3, 2000, plaintiff moved to vacate the dismissal as against all defendants other than Folsom, claiming mistake and pointing out it had assigned claims to Folsom which it had no right to dismiss. Folsom joined in the motion to vacate.

On February 25, 2000, the court granted the motion as to plaintiff, but not as to Folsom.

At some point Folsom filed a separate action against one of the sureties and other defendants, including McCollum, but this action was dismissed on March 29, 2000, for lack of personal jurisdiction by California courts. On August 21, 2000, Folsom dismissed its assigned claims. Nobody addresses Folsom's possible liability for fees, nor Folsom's absence from this appeal.

Plaintiff filed a motion to tax costs, attacking McCollum's request for fees on several grounds, principally the following: (1) McCollum was not a surety, and if he was a surety, he had failed to comply with a bond requirement and therefore was barred from filing pleadings; (2) McCollum was not a prevailing party because he "was voluntarily dismissed solely to allow him

to be made part of litigation pending in another state . . . .”; (3) Any fee award should be limited to work done for McCollum, not other defendants, and limited to work done defending the claim of liability on the payment bond, not other claims. In support, plaintiff relied on filings by Folsom, which including a request for judicial notice of an Arizona action filed by the County of San Luis Obispo and Folsom against numerous defendants, including McCollum. The first amended complaint in the Arizona action (*City of Folsom, et al. v. Greenway Environmental Svcs. Inc., et al.*; Maricopa Co. Super. Ct. No. CV2000-009194), included in the record on appeal, alleges that the two sureties perpetuated a scheme to issue fraudulent surety bonds, and McCollum and other named individuals were alter egos of the surety companies. A declaration by Folsom’s attorney avers the Arizona action was filed to cure the “jurisdictional problem” which caused dismissal of Folsom’s separate action.

In his opposition to the tax motion, McCollum’s attorney argued that if plaintiff “were to ultimately recover damages against defendant in a separate action [i.e., the Arizona proceedings], or if the City of Folsom might do so, that judgment, . . . would operate as a future offset against the present award in this case.” The attorney also filed a declaration attesting that the requested fees were “defense of the claim on the payment bond” only and had been “segregated, to the extent possible” from fees incurred on behalf of a named surety, as opposed to McCollum.

The trial court granted the motion to tax fees on the ground that McCollum was not a surety, and section 3250 "permits a surety who is susccessful [*sic*] on an action under a payment bond to recover fees and costs." The court did not rule on the reasonableness of the requested fees (i.e., time expended, apportionment between claims and between clients). The court issued a judgment for costs and McCollum filed a timely notice of appeal.

DISCUSSION

The Legislature has provided a variety of remedies for materialmen and contractors who are not paid in due course, including remedies applicable to work done on public works projects. Typically, such projects are secured by a payment bond, backed by sureties, supplied by the general contractor.

An aggrieved contractor is not permitted to file a mechanic's lien on public property, as is commonly done to secure payment in private contracting cases. Instead, he or she is limited to filing a "stop notice" or to filing an action on the payment bond. (See Acret, Cal. Construction Contracts and Disputes (Cont.Ed.Bar 3d ed. 2001) § 4.4, pp. 293-294, § 5.58, p. 437; Cal. Mechanics' Liens and Related Construction Remedies (Cont.Ed.Bar 3d ed. 2001) State and Local Public Works, §§ 4.2-4.6, pp. 208-210.) Generally, a stop notice is a mechanism to assert a priority claim against money, usually construction loan funds. (See *Mechanical Wholesale Corp. v. Fuji Bank, Ltd*. (1996) 42 Cal.App.4th 1647, 1654.) That procedure is not relevant to this appeal. Here, the aggrieved subcontractor

filed an action in part seeking recovery on the payment bond. "The payment bond . . . represents one of the best remedies available to claimants on a public construction project." (Cal. Mechanics' Liens, *supra*, § 4.92, p. 257.) The intricacies of payment bonds are largely beyond the scope of this opinion. (See Cal. Mechanic's Liens, *supra*, State and Local Public Works, §§ 4.92-4.115, pp. 257-273; *id.*, Bond Claim Procedures and Surety Defenses, § 10.1 et seq., pp. 613-676.1 [providing thorough outline of the law and recurring issues].)

Section 3250 provides: "The filing of a stop notice is not a condition precedent to the maintenance of an action against the surety or sureties on the payment bond. An action on the payment bond may be maintained separately from and without the filing of an action against the public entity by whom the contract was awarded or any officer thereof. In any action, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs."

The first sentence refers to a stop notice, a type of remedy not invoked in this case. (See Civ. Code, § 3103.) The last sentence was written in such a way as to abrogate caselaw construing an earlier version which held the prevailing party was not entitled to fees *on appeal*. (Stats. 1970, ch. 479, § 4, p. 950; see *Lewis & Queen v. S. Edmondson & Sons* (1952) 113 Cal.App.2d 705, 709-710.) This shows the Legislature wanted the prevailing party to be fully compensated for litigation expenses. The second sentence refers to actions on the payment bond. "The reference in section 3250 to fees 'in any action'

refers, in our view, to any action on the bond, as described in the preceding sentence." (*Walt Rankin & Associates, Inc.*, *supra*, 84 Cal.App.4th at p. 630.)

Section 3250 provides that an action on the payment bond need not include claims against the public entity, and "[i]n any action" the court "shall award to the prevailing party" its fees. (See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 198, pp. 721-722.) The ordinary understanding of "prevailing party" includes a defendant in a case where the plaintiff has voluntarily dismissed the action. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 609.)

There is a "strong policy of this state favoring mechanics, laborers and materialmen" which compels reading section 3250 broadly. (*Liton Gen. Engineering Contractor, Inc. v. United Pacific Insurance* (1993) 16 Cal.App.4th 577, 582 (*Liton*).) The general rules were summarized in *Liton,* at page 584, as follows:

"Under the principle of sovereign immunity, mechanics' liens may not be asserted on government projects. [Citation.] The only remedies available on public works are stop notices (Civ. Code, §§ 3179-3214) and actions on public works payment bonds (Civ. Code, §§ 3247-3252). Every original contractor to whom a public entity awards a contract in excess of $25,000 for any public work must, before beginning the work, file a payment bond with the public entity awarding the contract. (Civ. Code, § 3247.) The payment bond must be executed by 'good and sufficient sureties.' (Civ. Code, § 3096.) It must also provide 'in case suit is brought upon the bond, a reasonable

attorney fee, to be fixed by the court.'" (Civ. Code, § 3248, subd. (b).)

"In addition to protection of the public entity from liability for a defaulting contractor, the purpose of the surety bond is to provide a distinct remedy to public works subcontractors and suppliers of labor or materials to public works projects. '[T]he surety's labor and materials bond (payment bond) has uniformly been held to constitute a primary and direct obligation of the surety to the subcontractors and materialmen without reference to the liability of the public works contractor-the principal on the bond. [Citations.]' (Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal.App.3d 648, 654 [].) Hence, Civil Code section 2807 holds a surety liable immediately upon default of its principal. Moreover, an action against the surety on the payment bond may be maintained separately from and without the filing of an action against the public entity and without the filing of a stop notice. (Civ. Code, § 3250.) Finally, Civil Code section 3250 mandates the award of attorney fees to the prevailing party in any such action."

"Under the traditional 'American rule' each litigant must bear its own legal fees — whether it wins or loses. Section 3250 is one of a steadily growing family of statutes which modify this rule for certain kinds of litigation. A majority of these statutes only authorize courts to award attorney fees to winning plaintiffs while others only allow fee awards to winning defendants. The remainder are like section 3250 in allowing

either side to obtain attorney fees if – but only if – they prevail. [Citation.] However, section 3250 is different from many fee shifting statutes in requiring rather than permitting the trial court to award attorney fees to the prevailing party. That is, it provides 'the court shall' not 'the court may' award fees. Consequently, if [a party] qualifies as a 'prevailing party' it has a legal right to reasonable attorney fees no matter how the trial judge or this court might feel about whether equity or public policy are served by shifting fees in this particular case." (*Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1506 (*Winick*); fn. and italics omitted.)

A fee request is normally included in the costs memorandum. For purposes of awarding *costs*, the prevailing party includes "a defendant in whose favor a dismissal is entered[.]" (Code Civ. Proc., § 1032, subd. (a)(4).) This includes cases where a plaintiff voluntarily dismisses an action, except where a specific statute (e.g., Civ. Code, § 3176) otherwise applies. (*Santisas v. Goodin*, *supra*, 17 Cal.4th at pp. 606-609; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 128-129.)

Usually, in statutory fee cases (as opposed to contractual fee cases under Civil Code section 1717), "the courts generally treat the prevailing party issue the same for all statutes." (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2001) Prevailing Party Concept; Background, § 2.1, pp. 12-13 (Pearl).) The party who is deemed to be the prevailing party for purposes of costs (Code Civ. Proc., § 1032) "is usually, but not always,

the same as the party deemed to have prevailed under fee-shifting statutes." (Pearl, § 2.3, p. 14.)

Sometimes a plaintiff who achieves substantive relief but whose case is dismissed can still be considered the prevailing party, but "[u]nder CCP § 1032(a)(4), the determination of 'prevailing party" is more mechanical: A defendant in whose favor a dismissal is entered is the prevailing party for purposes of an award of 'costs.'" (Pearl, *supra*, § 2.3, p. 14.)

For example, in *Adler v. Vaicius* (1993) 21 Cal.App.4th 1770, the plaintiff filed a petition for an injunction under Code of Civil Procedure section 527.6, alleging the defendant was harassing her. After a temporary restraining order was issued, she dismissed her petition and the defendant sought costs, including fees. The plaintiff asserted that her voluntary dismissal after receiving interim relief deprived defendant of the status of prevailing party. The court disagreed: "A voluntary dismissal with prejudice is a final determination on the merits. [Citation.] [¶] A defendant has the right to seek costs after dismissal of the complaint, and attorney fees recoverable under statutory authorization are deemed an element of costs. [Citations.] *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 225 [], relied upon by appellant, does not aid her since *Olen* held that, in pretrial dismissal cases, the parties are left to bear their own attorney fees 'whether claim is asserted on the basis of the contract or [Civil Code] section 1717's reciprocal right.' Respondent is entitled to costs and attorney fees here because

section 527.6, subdivision (h), specifically provides for them, in the court's discretion, to a prevailing party. (See also § 1033.5, subd. (a)(10)(B).) [¶] Since section 527.6 does not define 'prevailing party,' the general definition of 'prevailing party' in section 1032 may be used. [Citation.] Section 1032, subdivision (a)(4), provides that '"Prevailing party" includes . . . a defendant in whose favor a dismissal is entered . . . .'" (*Id.* at pp. 1776-1777.)

And in *Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139 (*Reveles*) (disapproved on other grounds in *Snukal v. Flightways Manufacturing, Inc*. (2000) 23 Cal.4th 754, 775, fn. 6), part of the case involved a consumer protection statute providing for fees in some cases. The court concluded (*Reveles, supra,* at p. 1158) that "because the statute does not define 'prevailing party,' we use the general definition of Code of Civil Procedure section 1032. (*Adler v. Vaicius*, *supra*, 21 Cal.App.4th at p. 1777.)"

A party need not receive a judgment on the merits of the dispute to be a "prevailing party" under section 3250. In one case, a surety obtained a dismissal based on the claimant's dilatory prosecution. The court concluded the surety was the prevailing party (*Winick, supra,* 187 Cal.App.3d at p. 1508):

"Undertaking a'pragmatic inquiry' into whether the defendant prevailed in the instant case we first note what it obtained was a dismissal with prejudice which has the effect of a final judgment. [Citation.] This achieved one hundred percent of the "precise factual/legal condition" Safeco "sought

to change or affect." The most Safeco — or any other civil defendant — ordinarily can hope to achieve is to have the plaintiff's claim thrown out completely. This is exactly what happened here. In 'pragmatic' terms, it does not make any difference whether this total victory comes only after a jury reaches a verdict as to each and every substantive issue or whether, as here, it comes through a judge's decision the plaintiff waited too long to serve its complaint on the defendant. In any practical sense of the word, the defendant "' prevailed." (Italics omitted.)

In this case, the allegation that McCollum was the alter ego of the nominal sureties was never proven before the case was dismissed. McCollum obtained a judgment for costs which establishes his nonliability on the complaint. He achieved victory and is the prevailing party in all practical respects.

Plaintiff asserts McCollum is not entitled to fees under section 3250 for several reasons, which we will address seriatim.

1. Plaintiff repeatedly states or implies that McCollum *is* the alter ego of the sureties, and that he and his "cohorts" are perpetrating a fraud. These claims are not supported by citation to the record because they were not resolved by the trial court.

2. Plaintiff asserts the claims against McCollum were dismissed to facilitate an action by Folsom in Arizona state courts. It is not clear why Folsom's dismissal of claims against McCollum should exonerate plaintiff. Plaintiff further

asserts it assigned its claims to Folsom after Folsom settled with plaintiff on terms favorable to plaintiff. This does not show that *as between plaintiff and McCollum*, plaintiff received a more favorable outcome.

3. In a contention linked to the last point, plaintiff claims the trial court exercised discretion to conclude McCollum was not the prevailing party. The trial court did not purport to exercise its discretion, but denied fees because McCollum was not actually a surety. In any event, plaintiff bases this argument on the fact it recovered money *from Folsom*, and on its claim McCollum "has not disproved the alter ego claims against him." But McCollum succeeded in *this* lawsuit. Contrary to plaintiff's view, McCollum was not required to prove the merits of his claims to "prevail" in this lawsuit. (*Winick, supra,* 187 Cal.App.3d at pp. 1506-1508.)

4. In the trial court's view, McCollum loses because he was not actually a surety (or at least, did not prove that he was a surety) and therefore he is not able to invoke the reciprocal fee-shifting provision of section 3250. Plaintiff defends this conclusion.

Two separate reasons lead us to conclude the trial court was mistaken.

First, the statute does not by its terms require a successful defendant to be a surety. It provides that "[i]n any action" on the bond, the prevailing party gets fees. (§ 3250, see, e.g., *Contractor Labor Pool, Inc. v. Westway Contractors,*

Inc. (1997) 53 Cal.App.4th 152, 167). This was an action on the bond, in part, and McCollum prevailed. He gets fees.

Language in *Western Concrete Structures Co. v. James I. Barnes Constr. Co.* (1962) 206 Cal.App.2d 1 (abrogated on another point as stated in *Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 120, fn. 3) is not to the contrary. There, the general contractor sought fees, in addition to the fees awarded to the prevailing surety. The full passage, with the disputed language italicized, is as follows (*Western Concrete Structures Co. v. James I. Barnes Constr. Co., supra,* 206 Cal.App.2d at pp. 10-11): "Barnes' request for attorney fees is disposed of by our holding that the 'prevailing party,' as used in section 4207, is intended to be either the claimant who is successful in the action as against the surety or the surety who is successful against a claimant bringing an action against it . . . . In this latter instance, to hold that the contractor against whom the claim is made should also be awarded attorney fees would result in the imposition of double attorney fees upon an unsuccessful claimant. We do not believe that section 4207 was so intended or should be so interpreted, particularly where, as here, the claimant is successful in recovering a judgment against the contractor." (Italics added.)

The "either — or" passage italicized does not establish that a party who is sued as a surety, but is not a surety, cannot recover as the prevailing party in an action on a payment bond, as plaintiff suggests. Such a reading divorces the language from its context.

Damian v. Tamondong (1998) 65 Cal.App.4th 1115 (*Damian*) discusses a number of "prevailing party" statutes and cases discussing those statutes. The statute directly at issue in that case, Civil Code section 2983.4, did not define "prevailing party," and the losing party contended, as plaintiff contends herein, that a voluntary dismissal should not be enough to make a winning defendant the "prevailing party" under that statute. The losing party, like plaintiff herein, pointed out that Civil Code section 1717, subdivision (b)(2) *excludes* from the definition of "prevailing party" under that statute those parties who win because of a voluntary dismissal. Plaintiff suggests that because of this definition, voluntary dismissals should not make defendants "prevailing parties" in payment bond cases. Instead, we draw the opposite inference and conclude the Legislature knows how to except voluntary dismissals from statutes speaking of "prevailing parties," and where it does not do so, courts should not import the Civil Code section 1717 limitation. (See *Damian, supra,* 65 Cal.App.4th at pp. 1119-1128.) That the limitation itself arose from a California Supreme Court opinion (*International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218) does not mean the limitation must be read into all fee-shifting statutes. (*Damian, supra,* 65 Cal.App.4th at pp. 1123-1128 [discussing cases].) In particular, *Winick, supra,* 187 Cal.App.3d 1502 rejected an effort to import Civil Code section 1717's definition of "prevailing party" into a section 3250 case. Costs include fees when the recovering party

has a statutory basis to claim fees. (*Damian*, *supra*, 65 Cal.App.4th at pp. 1128-1129.) Costs go to "a defendant in whose favor a dismissal is entered." (Code Civ. Proc., § 1032, subds. (a), (b); see § 1033.5, subd. (a)(10)(B); *Damian*, *supra*, 65 Cal.App.4th at p. 1129; see also Pearl, *supra*, § 2.3, pp. 14-16.)

Not all voluntary dismissals make the defendant a "prevailing party." For example, where a plaintiff recovers substantially all the relief desired before dismissing the case, the defendant may not have "prevailed" in any real sense of the term, although the case has indeed been dismissed. (See *Damian, supra*, 65 Cal.App.4th at pp. 1129-1130 [discussing cases].)

In an unusual case, involving "a complex series of cross-complaints and subsidiary actions" drawing in numerous parties, a global settlement was reached by all parties except one, and the settlement required a dismissal of the action against that party, without prejudice. As part of the settlement it was understood that there were no prevailing parties. (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1570-1571.) Predictably, the nonsettling party sought costs, including fees under Civil Code section 1354, providing for fees to the prevailing party in actions to enforce equitable servitudes. The court concluded a trial court should determine "which party had prevailed on a practical level," and concluded the trial court did not abuse its discretion to determine no party prevailed. (*Id.* at p. 1574.)

And in *Galan v. Wolfriver Holding Corp.* (2000) 80 Cal.App.4th 1124, the plaintiff negotiated a settlement with other defendants and dismissed defendant Wolfriver from the case because the plaintiff thought any judgment against Wolfriver would be uncollectible. Wolfriver then sought fees under Civil Code section 1942.4. (*Id.* at pp. 1126-1127.) The trial court denied fees because "'at a practical level'" Wolfriver had not prevailed, because the plaintiff achieved a victory in a settlement with other defendants. (*Ibid.*) The appellate court agreed the trial court had discretion to determine who was the prevailing party under that statute and such discretion had not been abused. (*Id.* at pp. 1127-1130.) The court reiterated caselaw to the effect that the costs statute definition of prevailing party does not always control.

But *in general*, the rule as stated by the California Supreme Court is that "recoverable litigation costs do include attorney fees, but only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees." (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 606 [a voluntary dismissal case].) Here, the "other law" providing for fees is section 3250. In this case the trial court did not conclude that the existence of the action in Arizona provided some special "practical" reason for not awarding fees, it simply held that because McCollum was not a surety, he could not get fees. Nor could the existence of the Arizona action support denial of fees in this context. A

defendant may choose to defeat one dragon at a time. McCollum contributed nothing to plaintiff's settlement with Folsom, and walked away from the lawsuit victorious, because the trial court concluded California was the wrong jurisdiction in which to sue him. Generally, as indicated, a dismissal confers on the defendant the status of prevailing party. (Pearl, *supra*, § 2.15, p. 33.) The fact the merits of the dispute may continue in Arizona does not change the fact that McCollum prevailed here. (See Pearl, *supra*, § 2:18, pp. 35-36 [party may prevail even where appeal pends or merits remain to be decided].) In general, "[a]lthough the courts are understandably reluctant to award fees based on a nonmeritorious claim, they are also reluctant to decide the merits of a moot controversy solely to decide whether fees may be awarded. . . . [A] resolution of the ultimate merits of the claim is not necessary to accomplish the fee-shifting statute's purposes." (Pearl, *supra*, § 2.25, p. 46.1.) So far as California courts are concerned, the controversy is over.

Second, section 3250 furthers the public policy of securing payment for materialmen and workers on public works projects, and must be construed liberally to effectuate that public policy. (*Liton*, *supra*, 16 Cal.App.4th at p. 582.) Although this particular case involves a successful defense to a claim by a subcontractor, the Legislature provides a fee award in such cases, and among other purposes, the possibility of such an award reduces the cost of bonds, and therefore ultimately the cost to the public of public works projects. Had plaintiff

proven its case, the statute would be interpreted to provide for fees. In other words, we accept plaintiff's original premise that the alter ego of a surety would be as liable for fees as the surety itself. But having asserted McCollum is in effect the surety and is liable for fees, plaintiff cannot now hide behind its failure to prove its allegations and say the statute should be read narrowly to provide that only actual sureties can be liable for fees. Plaintiff acknowledges that Civil Code section 1717 provides that a party who is not liable in an action on a contract is still entitled to fees, but urges the reciprocal fee-shifting statute here should not be so construed. We conclude the opposite: Where a reciprocal statute provides for fees to the prevailing party who is sued under that statute but ultimately is not shown to be liable (or even connected to the transaction), the prevailing party should ordinarily be entitled to fees. (*Santisas v. Goodin, supra,* 17 Cal.4th 599.)

Moreover, having argued McCollum was a surety (or the alter ego of a surety), and having sought fees on that basis, plaintiff cannot now, having failed, say McCollum is *not* the alter ego simply to avoid a fee award. Plaintiff is judicially estopped to make this claim. (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175.)

DISPOSITION

The judgment awarding costs is vacated and the cause is remanded with directions to the trial court to include in the cost award reasonable attorney fees incurred by McCollum in defending against plaintiff's claims and in pursuing this

appeal. (§ 3250.) Plaintiff is to pay McCollum's costs of this appeal. (Rule 26(a), Cal. Rules of Court.)

MORRISON, J.

We concur:

SIMS, Acting P.J.

NICHOLSON, J.